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August 21, 2002

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Via Hand Delivery

Marlene H. Dortch, Secretary
Federal Communications Commission
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AUG 21 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Comments Requested on Verizon's Application for Authorization to Provide In-region, InterLATA Service in the State of Virginia, WC Docket No. 02-214

Enclosed please find a copy of OpenBand of Virginia, L.L.C.'s comments in response to Verizon Virginia Inc.'s application under Section 271 of the Telecommunications Act as invited by the Federal Communications Commission in relation to the above referenced case.

Sincerely,

James N. Moskowitz

cc: Janice Myles - Rm. 5-C327 (15)
Qualex International - Rm1 CY-B402 (1)

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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

IN THE MATTER OF

Application by Verizon Virginia, Inc.,)
Verizon Long Distance Virginia Inc.,)
Verizon Enterprise Solutions Virginia)
Inc., Verizon Global Networks Inc., and)
Verizon Select Services of Virginia Inc.,)
for Authorization To Provide In-Region,)
InterLATA Services in Virginia)

WC Docket No. 02-214

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AUG 21 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF OPENBAND OF VIRGINIA, L.L.C.

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SUMMARY

As set forth herein, OpenBand is a facilities-based competitor in Virginia that builds and operates state-of-the-art, broadband last mile networks in Virginia residential communities. To connect these community-based fiber networks to each other and to the national and international networks at large, OpenBand must, in some cases, rely on Verizon for network elements such as transport, dark fiber, and UNE combinations. It is these discrete elements, therefore, that are the focus of OpenBand's comments in this proceeding.

In sum, Verizon has not offered transport, dark fiber, or UNE combinations in a manner that gives OpenBand (and competitors like it) meaningful access and an opportunity to compete in Virginia on an equal footing with Verizon as required under Section 251 of the Telecommunications Act of 1996 ("Act"). Because of this, Verizon has not yet met the requirements set forth in Section 271 and must not be permitted to extend its current monopoly in the local market back into the long distance market without some significant conditions placed on the way it currently operates Virginia.

Twenty years ago the federal courts recognized that separating the incumbent monopolies' long distance services from their local service offerings was essential to fostering competition for telecommunications services. Congress also recognized the necessity of protecting the public, competitors, and indeed competition itself from the market power of the local service monopolies, such as Verizon, and carefully crafted the Act to ensure that the local monopolies would not be permitted to re-enter the long distance market until specific, enumerated market opening criteria were met.

Before permitting Verizon to re-enter the long distance market in Virginia, the Commission must be very careful to provide certainty that Verizon transport, dark fiber, and

UNE combination offerings are clearly and irreversibly available to competitors like OpenBand. Such certainty is essential to justify the substantial investments necessary for the development of true competitive broadband opportunities for homeowners in Virginia. As explained further below, Verizon's current offerings do not offer this critical assurance, and this creates significant uncertainty in the marketplace. The current proceeding is essentially the Commission's last opportunity to ensure that competitors, and subsequently the public in general, will ever truly and irreversibly obtain the benefits of competition as envisioned by the Act. If left unchecked, Verizon is poised to re-extend its local monopoly back into the market for long distance services and, once it is permitted to do so, it will have no further incentive to cooperate with its competitors, or indeed with the Commission itself.

COMMENTS OF OPENBAND OF VIRGINIA, L.L.C.

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I. INTRODUCTION

OpenBand of Virginia, L.L.C. ("OpenBand"), thought its counsel, hereby submits the following comments in the above-referenced proceeding.¹ As set forth below, OpenBand believes that Verizon Virginia, Inc. ("Verizon") has not met the requirements set forth in Section 271 of the Telecommunications Act of 1996 ("Act").² OpenBand therefore urges the Federal Communications Commission ("Commission") to place conditions on any approval designed to ensure that Verizon comes into compliance with the obligations set forth by Section 271 before gaining its benefits. Specifically, the Commission needs to ensure that Verizon provides competitive local exchange carriers ("CLECs") with full and fair access to its interoffice transport and UNE combinations. In addition, the Commission must require that Verizon modify its dark fiber offerings, which are not currently consistent with law and do not offer CLECs in Virginia a meaningful opportunity to compete. Finally, the Commission must require that Verizon implement a more rationalized order review process and ensure that there is an adequate dispute resolution processes in place to accommodate minor disputes between Verizon and its wholesale customers.

II. BACKGROUND

OpenBand is a wholly owned subsidiary of M.C. Dean, Inc.³ and a licensed, facilities-based telecommunications carrier in the mid-atlantic region. OpenBand offers consumers "one stop shopping" broadband communications solutions. In particular, OpenBand designs, engineers, constructs, and then utilizes state-of-the-art, broadband networks to provide bundled

¹ See *Comments Requested on Verizon's Application for Authorization to Provide In-region, InterLATA Service in the State of Virginia*, WC Docket No. 02-214, Public Notice, DA 02-1893 (rel. August 1, 2002).

² 47 U.S.C. § 271.

³ M.C. Dean, Inc. has over 50 years of experience in systems design, integration, construction, and life cycle support.

and converged communications solutions that include high-speed data, voice, video, converged network, consulting, and OSS services.

In the past, OpenBand has tailored its service offerings primarily for business and government customers. In the past year, however, OpenBand has been able to extend its network engineering expertise and converged, broadband service offerings to residential consumers. In particular, OpenBand now teams with land developers and residential home builders to design and build networks known as “smart neighborhoods” or “wired communities” (“Wired Communities”). To date, OpenBand has invested over \$15 million in residential broadband facilities at these communities, with over \$25 million more on the immediate horizon.

Drawing from the design and engineering expertise of its parent company, OpenBand provides new residential communities with custom designed, secure communications infrastructure, including, among other things, community-wide fiber-optic backbones, fiber-to-the-home connectivity, and community-dedicated central offices housing state-of-the-art voice, video, and data equipment. Through these facilities, OpenBand is able to provide every community resident with a complete, pre-wired package of communications service options, including, but not limited to, local and long distance telephone, analog and digital cable television, 100 mbps, always-on Internet connectivity, digital home security, web-based home automation, and even a community intranet (including connections to local schools). Moreover, these services come with the convenience and efficiency of a single, monthly bill and a single provider with a demonstrated commitment to cutting-edge technology and service quality.

OpenBand believes that in Wired Communities it has found a competitive, effective, and viable model for the future growth of residential broadband, bundled, and converged service availability. The success of this model, however, lies in part on OpenBand’s ability to connect

its community-based, broadband networks to each other and to the outside world (*i.e.*, national and international networks). The primary medium for making these connections is fiber-based transport facilities. In many cases, the most cost effective and, at times, only viable option for obtaining these facilities is to utilize Verizon's existing network.

III. ACCESS TO VERIZON NETWORK ELEMENTS

A. Interoffice Transport

In the *UNE Remand Order*, the Commission determined that viable competitive alternatives do not exist for interoffice transport and that competitors are impaired without cost-based access to these ILEC facilities.⁴ OpenBand maintains that the Commission's determination is especially true in the areas of Virginia where OpenBand is now deploying Wired Community facilities and that further steps must be taken in order for Verizon to fully open its network to competitors as required under Section 271.

In the largely rural and suburban residential markets in which OpenBand now operates, OpenBand relies upon transport facilities to connect its Wired Community networks to one another and to outside networks. In these residential areas, the market for transport facilities simply has not matured to a level that provides OpenBand with viable alternatives to Verizon. Indeed, in many places, Verizon's facilities are essentially OpenBand's only option (outside of cost-prohibitive self-deployment) for the last vital link necessary to give residential consumers the full benefit of the sophisticated, community-based broadband networks that OpenBand is actively deploying.

⁴ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶ 321 (1999) ("*UNE Remand Order*").

In the Hearing Examiner's report to the Virginia State Corporation Commission ("VSCC") relating to Verizon's Section 271 application for Virginia ("*Hearing Examiner's Report*"),⁵ the Hearing Examiner dismissed OpenBand's requests with regard to dark fiber with the simple assertion that the conditions that OpenBand sought were not required by the Act.⁶ However, the *Hearing Examiner's Report* did not provide any detailed legal analysis or reasoning to support this assertion.⁷ Instead, the *Hearing Examiner's Report* provided only a cursory sketch of the proceeding at the state level, which was devoid of any significant legal analysis of the requirements of the Act as compared to Verizon's actual practices in Virginia.

As OpenBand made clear in the VSCC 271 proceeding, several regulatory authorities have reviewed the applicable federal law on these issues and found that the requirements that OpenBand seeks to have implemented in Virginia are necessary under the Act to ensure competitive access to interoffice transport and dark fiber.⁸ Indeed, the Arbitration Order for Virginia issued by this Commission ("*VA Arbitration Order*")⁹ contains over 450 pages of analysis regarding the interconnection arrangements that Verizon must provide in Virginia consistent with Section 251 of the Act. The *VA Arbitration Order* was released shortly after the *Hearing Examiner's Report*, and addressed many of the same issues relating to Verizon's

⁵ *In the Matter of Verizon Virginia, Inc. to Verify Compliance with the Conditions Set Forth in 47 U.S.C. § 271(c)*, Case No. PUC-2002-00046, Report of Alexander F. Skirpan, Jr. Hearing Examiner (rel. Jul. 12, 2002) ("*Hearing Examiner's Report*").

⁶ *Id.* at VI.E.4, p. 123-124.

⁷ *Id.*

⁸ See *In the Matter of Verizon Virginia, Inc. to Verify Compliance with the Conditions Set Forth in 47 U.S.C. § 271(c)*, Case No. PUC-2002-00046, Official Reporter's Minutes, p. 187 – 221 (June 17, 2002) (please note date on cover of transcript is in error) ("*VA 271 Hearing Transcript*") (attached hereto as Attachment A); See also *In the Matter of Verizon Virginia, Inc. to Verify Compliance with the Conditions Set Forth in 47 U.S.C. § 271(c)*, Case No. PUC-2002-00046, Brief of OpenBand of Virginia, L.L.C. (filed July 1, 2002) (attached hereto, without its accompanying attachments, as Attachment B).

⁹ See *Petition of WorldCom, Inc, et al., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon*

obligation under the Act, yet reached conclusions opposite those of the *Hearing Examiner's Report*.¹⁰ In fact, in the *VA Arbitration Order* the Commission ruled that Verizon was not providing access to its network elements in conformity with the Act and set forth specific areas where Verizon needed to change its operational practices to come into compliance.¹¹ What's more, when confronted with the apparent contradiction between the two rulings, the *Hearing Examiner's Report* punted, and declared that any resolution of conflicts between the two documents needed to be resolved by the Commission.¹²

Given this apparent contradiction between the *Hearing Examiner's Report* and the *VA Arbitration Order*, The Commission should, therefore, make every effort in this proceeding to thoroughly review the record and ensure that competitive providers like OpenBand have (and will continue to have) fair and full access to Verizon interoffice transport facilities, including dark fiber as discussed below. Further, the Commission should prohibit any Verizon limitations on such access (*e.g.*, capacity restrictions or restrictions on traffic types) that would in any way limit the ability of facilities-based broadband providers like OpenBand to use these Verizon facilities for extending innovative and competitive broadband, bundled, and converged service capabilities to residential consumers.

B. Dark Fiber

A specific transport element that OpenBand believes Verizon does not currently provide in Virginia in accordance with the requirements the Act is dark fiber. In many instances, Verizon has deployed fiber transport facilities with capacity along network routes that run in and around

Virginia, Inc., and for Expedited Arbitration, CC Docket Nos. 00-218, 00-249, 00-215, Memorandum Opinion and Order, DA 02-1731 (rel. July 17, 2002) ("*VA Arbitration Order*").

¹⁰ See *id.* at ¶ 445 et seq.

¹¹ See, *e.g.* *id.*

¹² See *In the Matter of Verizon Virginia, Inc. to Verify Compliance with the Conditions Set Forth in 47 U.S.C. §*

OpenBand Wired Communities. The availability of these facilities would give OpenBand the opportunity to avoid the substantial and competitively prohibitive cost required for deploying duplicate facilities. Moreover, by using available dark fiber, OpenBand would avoid the disruption to the community caused by construction while roadways are dug up to lay new facilities.

While OpenBand may still ultimately decide to overbuild idle Verizon facilities for its own network purposes, the ability to make a “buy” vs. “build” decision is a critical element of competition. The importance of this decision was not lost on the Commission in its *UNE Remand Order*, and it should not be lost in this proceeding that the unbundling requirement for dark fiber remains the law of the land.¹³ Moreover, the same lack of alternatives in residential markets that calls for full and fair access to unbundled Verizon interoffice transport in general (as discussed above), also calls for the same unfettered access specifically to unbundled Verizon dark fiber. The Commission should, therefore, make every effort in this proceeding to ensure that competitive providers like OpenBand have, and will continue to have, fair and full access to Verizon dark fiber facilities on an unbundled basis.

In doing so, OpenBand believes that the Commission should, at a minimum, address and rectify a number of substantial dark fiber access policies that Verizon employs in Virginia, which are not consistent with the unbundling requirements of Section 251 of the Act. OpenBand has found that while Verizon purports to make dark fiber available on a nondiscriminatory basis, it has, in practice, shielded dark fiber from competitors behind unnecessary and unlawful barriers. Indeed, despite the Commission’s best efforts in the *UNE*

271(c), Case No. PUC-2002-00046, Hearing Examiner’s Ruling (rel. Aug. 15, 2002) (“*Hearing Examiner’s Ruling*”) (attached as Attachment C).

¹³ *UNE Remand Order* at ¶ 325 *et seq.*

Remand Order, in OpenBand's experience Verizon has made the right to obtain unbundled dark fiber in Virginia almost entirely illusory.

OpenBand has attached the dark fiber provisions adopted by the Texas,¹⁴ Maine,¹⁵ and Massachusetts¹⁶ commissions for the Commission's consideration. Each of these commissions reviewed federal law and found that specific practices regarding dark fiber are necessary to ensure competitive access as required by Sections 251 and 271 of the Act. As discussed above, the Commission itself ruled that several of the proposals advocated by OpenBand are required for Verizon's compliance with Section 251 in Virginia. Given the weight of these authorities, there is no valid reason why Virginia competitors and consumers deserve anything less than the protections and opportunities that are provided to competitors in other states under federal law.

i. Dark Fiber Termination

One of the primary examples of a Verizon barrier to dark fiber in Virginia is that Verizon does not make available in-place, spare fiber facilities that have been left un-terminated (or at some other stage of installation that leaves the fiber one simple step away from use). The following language from a recent version of Verizon's multi-state template interconnection agreement proposal is an illustrative example of this limitation:

¹⁴ *Joint Petition of CoServ, LLC dba CoServ Communications and MultiTechnology Services, LP dba CoServ Broadband Services for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Southwestern Bell Telephone Company*, Docket No. 23396, Arbitration Award (April 17, 2001) ("*TX Arbitration Award*"). Relevant excerpts from the *TX Arbitration Award* are provided in Attachment D.

¹⁵ Verizon's relevant dark fiber requirements in Maine are reflected in Letter from Mr. Edward Dinan, President of Verizon Maine, to Thomas L. Welch, Chairman, Maine Public Utilities Commission (March 4, 2002) ("*Maine Letter*") (attached hereto as Attachment E). Further requirements are reflected in Verizon's newly proposed Maine Tariff No. 20, Part B, Section 2. Verizon New England Inc. d/b/a Verizon ME, PUC ME No. 20, § B 2.1 (Issued: May 1, 2002, proposed effective May 31, 2002) (attached hereto as Attachment F).

¹⁶ Verizon's relevant dark fiber requirements for Massachusetts are reflected in its Massachusetts Tariff No. 17, Part B, Section 17. Verizon New England Inc. DTE MA No. 17, § B.17 (Issued: October 05, 2000, effective September 14, 2000) (attached hereto as Attachment G).

Dark Fiber Loops, Dark Fiber Sub-Loops and Dark Fiber [Transport] are not available to [CLEC] unless such Dark Fiber Loops, Dark Fiber Sub-Loops or Dark Fiber [Transport] are already terminated on an existing Verizon Accessible Terminal . . . Unused fibers located in a cable vault or a controlled environmental vault, manhole or other location outside the Verizon Wire Center, and not terminated to a fiber patch panel, are not available to [CLEC].¹⁷

The apparent basis for this “termination” requirement is that the definition of dark fiber contained in the *UNE Remand Order* requires that dark fiber “connect two points within the incumbent LEC’s network” and be “installed and easily called into service.”¹⁸ If, therefore, Verizon installs spare fiber facilities, but chooses not to terminate the fiber until Verizon desires its use, Verizon’s position is that the facilities are not available to CLECs. This is a patent manipulation of the Commission’s rules, creating a substantial barrier to the availability of dark fiber in Virginia.

As an initial matter, it cannot be said that a termination requirement advanced by Verizon naturally flows from the Commission’s *UNE Remand Order* definition of dark fiber. In particular, the fact that fiber facilities are not physically connected to a termination frame or other facility does not mean that they still do not connect two points within Verizon’s network. Fiber facilities still constitute an uninterrupted pathway between two locations in Verizon’s network whether or not the ends of that pathway are attached to a fiber distribution interface (FDI), light guide cross connect (LGX) panel, splice shelf, or other facility at those locations. In addition, the termination of fiber is an inherently simple and speedy task. It cannot fairly be argued that un-terminated fiber is not “installed and easily called into service.” Indeed, it is completely disingenuous, not to mention anti-competitive and discriminatory, to say that fiber is not

¹⁷ See Verizon Multistate Interconnection Agreement Template Proposal, v2.6 at Network Element Attachment § 8.2.2.

“installed and easily called into service” when a competitor asks for it, but is readily available (after marginal work) when Verizon wants to use it.

Interpretation aside, the primary problem with Verizon’s termination requirement is that it allows Verizon to render dark fiber unbundling obligations completely meaningless. Simply put, by requiring termination, Verizon can unilaterally insulate every strand of spare fiber in its network from use by a competitor by simply leaving it un-terminated until Verizon wants to use it. Indeed, Verizon could conceivably disconnect existing spare fiber to remove it from its definition of dark fiber. This is discriminatory on its face. The fiber is effectively there for Verizon when it chooses to use it, yet disappears when a CLEC seeks access - - they would not even have access to information about such fiber. This is surely not what the Commission intended in the *UNE Remand Order*, but it is a very real obstacle that competitive providers like OpenBand face every day.

The *Hearing Examiner's Report* concluded that OpenBand's position with regard to dark fiber termination was not required by the Act.¹⁹ However, the *Hearing Examiner's Report* did not provide any legal analysis or reasoning to support this assertion.²⁰ In the *VA Arbitration Order*, the Commission addressed some issues relating to when Verizon's fiber in Virginia is to be made available.²¹ However, it did not address issues relating to when terminated and un-terminated dark fiber must be made available. OpenBand believes that the Commission must resolve this issue prior to granting Verizon's 271 application for Virginia and set forth guidelines as to when Verizon must make its un-terminated dark fiber available to competitors.

¹⁸ See *UNE Remand Order* at ¶ 325.

¹⁹ *Hearing Examiner's Report* at p. 123-124.

²⁰ *Id.*

²¹ See *VA Arbitration Order* at ¶ 445 et seq. (rel. July 17, 2002) (“*VA Arbitration Order*”).

Other jurisdictions have addressed the issue of dark fiber termination. Last year, the Public Utility Commission of Texas ("Texas PUC") tackled the termination requirement in an interconnection arbitration involving Southwestern Bell Telephone Company ("SWBT").²² In the resulting arbitration award the Texas PUC arbitrators flatly rejected the termination requirement. The arbitrators rejected the notion that for the purposes of availability under the Act fiber does not connect two points in a network simply because it is not physically terminated.²³ Substantial evidence and testimony in the record also demonstrated that termination often only required less than one day or night's work to perform and that the termination of fiber at the time it is installed is infinitely more efficient than piece-meal termination thereafter. The arbitrators, therefore, also concluded that in-place, spare fiber that was not terminated was nevertheless "installed and easily called into service" consistent with the Commission's *UNE Remand Order* definition of dark fiber.²⁴

In accordance with these determinations, the Texas PUC arbitrators adopted the following contract language, specifying that SWBT's dark fiber unbundling obligations do not turn on whether or not fiber is terminated:

In SBC-12STATE dark fiber is deployed, unlit fiber optic cable that connects two points within the incumbent LEC's network. Dark fiber is fiber that has not been activated through connection to the electronics that "light it", and thereby render it capable of carrying communications services. Dark fiber also includes unlit fiber optic cable that has not yet been terminated on an LGX or FDI panel or other appropriate device.²⁵

In instances where a CLEC requests from SWBT dark fiber that is not terminated, the arbitrators adopted a simple mechanism in which SWBT will terminate the fiber on the

²² See *TX Arbitration Award* at pp 112 - 113.

²³ *Id.*

²⁴ *Id.*

requesting CLEC's behalf subject to the recovery of all reasonable costs for doing so from the CLEC. The following approved language reflects this equitable arrangement:

SBC-12STATE will make available to CLEC dark fiber facilities based on the facilities cross-section of all fibers between "A" and "Z" locations regardless as to whether the fiber is terminated or not. If dark fiber is not terminated, SBC-12STATE will terminate the fiber, and CLEC will pay SBC-12STATE's reasonable costs in connection with such activities.²⁶

The rejection of SWBT's termination requirement by the Texas PUC was entirely necessary and appropriate to preserve dark fiber as a meaningful competitive option for CLECs in Texas. Unfortunately, the termination requirement is an obstacle that goes beyond the borders of Texas or the business practices of SWBT. As demonstrated in the Verizon language provided above, the termination requirement is also a problem in Virginia that requires the attention of this Commission. The Commission should, therefore, use this proceeding to reject a termination requirement or any other similar impediment to the availability of dark fiber and adopt clear guidelines like those created by the Texas PUC.

ii. Dark Fiber Information

Another primary example of a Verizon barrier to dark fiber in Virginia is Verizon's refusal to provide timely or usable information on the location of dark fiber in their networks. Typically, Verizon will only inform a competitor whether dark fiber is available between two locations if the competitor specifically inquires about the particular route. The following provision from a recent version of Verizon's multi-state template interconnection agreement provides a description of this typical process:

A Dark Fiber Inquiry must be submitted prior to submitting an ASR. Upon receipt of the completed Dark Fiber Inquiry, Verizon

²⁵ *Id.* at 116.

²⁶ *Id.*

will initiate a review of its cable records to determine whether Dark Fiber Loop, Dark Fiber Sub-Loop or Dark Fiber [Transport] may be available between the locations and in quantities specified. Verizon will respond within (15) Business Days from receipt of the [CLEC's] request, indicating whether Dark Fiber Loop, Dark Fiber Sub-Loop or Dark Fiber [Transport] may be available based on the records search.²⁷

If Verizon responds that there is no dark fiber available for the route requested, there is no way for the competitor to question or confirm Verizon's determination. Moreover, Verizon may deny that dark fiber exists between two locations based on the competitor's route request, but there may still be an alternative route that Verizon does not disclose. Competitors like OpenBand, therefore, are relegated to guesswork and a virtual "shell game" with Verizon. Verizon's piecemeal disclosure of the location and availability of dark fiber also leaves competitors without any effective information source so that they may include dark fiber in any of their long term network planning. This guesswork also extends to the competitor's network forecasting. In short, competitors like OpenBand need to know where dark fiber is in Verizon's network in order to have any meaningful opportunity to use it.

It its recent decision in the arbitration between Verizon and AT&T, Cox and WorldCom, the Commission made the common sense determination that meaningful competitive access to dark fiber in accordance with Section 251 requires that Verizon provide competitors with the same detailed underlying information regarding the composition and qualifications of its dark fiber facilities that it possesses itself, including maps and other plant record OSS capabilities.²⁸ Although the need for this information for meaningful competitive access should be obvious, the *Hearing Examiner's Report* did not regard providing facilities information as required under the

²⁷ See Verizon Multistate Interconnection Agreement Template Proposal, v2.2-083101 at § 8.2.5.

²⁸ See *VA Arbitration Order* at ¶ 473.

Act.²⁹ Regrettably, even with the Commission's subsequent release of the *Arbitration Order*, which ruled that such a requirement was required under the Act, the VSCC refused to reconsider its position on this and many other issues and instead left it to this Commission to reconcile the findings of the *Arbitration Order* with Verizon's compliance with its obligations under Section 271.³⁰ As part of this reconciliation, OpenBand believes that Commission must require Verizon to make this same information available to all competitors in Virginia as a condition for granting Verizon's present 271 application.

There are several precedents for such a requirement. The Maine Public Utilities Commission ("Maine PUC") found Verizon's practice of not providing information regarding the location and availability of dark fiber inadequate for compliance with Checklist Item 5 – Transport.³¹ The Maine PUC reasoned that rejection of dark fiber orders with the simple explanation that there are no facilities is inadequate and turns the process of ordering dark fiber "into nothing short of a guessing game."³² In keeping with this finding, the Maine PUC required Verizon to adopt practices relating to dark fiber information that are similar to those that required in other Verizon states. Specifically, the Maine PUC required Verizon to provide dark fiber provisioning information as follows:

If a dark fiber inquiry reveals there is no dark fiber available, Verizon will, upon separate request from a CLEC, provide the CLEC with written documentation and a fiber map within 30 days of the request. The document will show the following information:

²⁹ *Hearing Examiner's Report* at VI.E.4, p. 124.

³⁰ *See Hearing Examiner's Ruling* supra n. 12.

³¹ *See Inquiry Regarding the Entry of Verizon-Maine Into the InterLATA (Long Distance) Telephone Market Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. 2000-849, Findings of the Maine Public Utilities Commission on Verizon's Compliance with Section 271 of the Telecommunications Act of 1996, § IV(F)(3)(a) (rel. Apr. 10, 2002) (available at: <http://www.state.me.us/mpuc/orders/2000/2000-849-271comments-MPUC%20Findings.htm>).

³² *Id.*

- a map (hand-drawn, if necessary) showing the spans along the most direct route and two alternative routes (where available), and indicating which spans have spare fiber, no available fiber, and construction jobs planned for the next year or currently in progress with estimated completion dates.
- the total number of fiber sheaths and strands between points on the requested routes;
- the number of strands currently in use or assigned to a pending service order;
- the number of strands in use by other carriers;
- the number of strands assigned to maintenance;
- the number of spare strands;
- the number of defective strands.

The CLEC will be billed a non-recurring charge per request for cable documentation to reimburse [Verizon] for the costs incurred in providing the CLEC with the Documentation.

The Maine PUC set the interim rate for providing the documentation at \$132.00.³³

OpenBand believes that competitors must also be given access to the full range of network information that the incumbent itself uses. Simply accessing Verizon's data is more efficient, in terms of time and cost than a mapping approach. Relying on maps alone can introduce unnecessary delay and cost into a process where the information is readily available internally to Verizon itself by other means. Further, with reliance upon maps alone there is no way for the competitor to verify Verizon's information. This concern is especially acute where network planning must precede construction by months and even years. In these instances an

³³ *Id.*

error in a map can be amplified through the construction planning process, with disastrous results in terms of delay, and potentially, unfulfilled obligations to end users.

There is precedent for requiring direct access to Verizon's dark fiber information. In the same Texas proceeding noted above, the Texas PUC also addressed a SWBT proposal to provide dark fiber information to CLECs in the same manner as currently provided by Verizon in Virginia. Again, Texas PUC arbitrators flatly rejected SWBT's proposal limiting access to dark fiber information. The arbitrators recognized the inefficiencies, discrimination, and potential abuse inherent in forcing CLECs to rely on SWBT record searches for dark fiber information. The arbitrators, therefore, required SWBT to let a CLEC access SWBT plant location records itself, as reflected in the following approved contract language:

To determine the actual fibers available, SBC-12STATE will allow CLEC to access the Plant Location Records (PLR) to ascertain a count of the total installed fibers between the "A" and "B" locations. If necessary SBC-12STATE will then provide information from the Trunks Integrated Records Keeping System (TIRKS), or any equivalent system, prepared by SBC-12STATE personnel to identify the total number of (lit) fibers in service.³⁴

The arbitrators also instructed the parties to the arbitration to negotiate and include language in their interconnection agreement that reflected the following guidelines:

SWBT will provide [CLEC] access to PLRs indicating the location of fiber. This access must be reasonable and no different than what it provides to other CLECs.

In instances where the PLRs do not show the most recently completed fiber jobs in a requested geographic area, SWBT is instructed to advise [CLEC] of what facilities have been deployed but are not reflected in the PLRs.

Additionally, SWBT shall provide [CLEC] reports from the TIRKS database prepared by SWBT within 5 business days of a

³⁴ See *TX Arbitration Award* at 117.

[CLEC] request. SWBT and [CLEC] shall abide by confidentiality agreements aimed at preventing either party from inappropriately using the competitively sensitive information shared between them. Within 90 days from the date of this order, SWBT and [CLEC] shall jointly file a report concerning the procedures that they have put in place to protect customer-specific dark fiber information.³⁵

As with the dark fiber termination requirement, OpenBand encourages the Commission to adopt the same or similar standards for dark fiber information as those adopted by the Texas PUC and, at a minimum, the Maine PUC as a condition for granting Verizon 271 Application for Virginia. OpenBand, and many other similarly situated competitive providers in Virginia, are faced with the same inefficient and anticompetitive process for obtaining dark fiber information as that rejected in Maine and Texas. Simply put, to use dark fiber, competitors must know where it is.

Existing Verizon procedures for providing dark fiber information are woefully inefficient, discriminatory, and are ripe for Verizon abuse.³⁶ OpenBand, therefore, encourages the Commission to adopt specific guidelines similar to those provided by the Texas PUC and the Maine PUC, clarifying that a necessary component of dark fiber requirements is to give competitors nondiscriminatory access to necessary information that will allow a competitor to determine where dark fiber is available in Verizon's network.

C. UNE Combinations

Another aspect of Verizon unbundling obligations that is important to OpenBand in deploying broadband, bundled, and converged services to wired communities is UNE combinations. In particular, in some cases, OpenBand will require combinations of interoffice transport, and potentially other network elements, in order to connect its community-based,

³⁵ See *id.* at 122-123.

³⁶ See *VA 271 Hearing Transcript* at 199, 202.

broadband networks to each other and to outside networks. OpenBand, therefore, encourages the Commission to ensure in this proceeding that OpenBand will not have to face the same predictable obstacles that Verizon has traditionally placed in the way of obtaining UNE combinations. While it is encouraging that the Supreme Court recently upheld the Commission's UNE combination rules, Verizon does not have an established track-record for providing them in Virginia.

Of particular concern to OpenBand is Verizon's use of a bona fide request ("BFR") process for the provisioning of UNE combinations. Among other things, the Commission should ensure that Verizon's extended and burdensome BFR process is reserved for UNE combinations that truly deserve special consideration (*i.e.*, combinations that are truly extraordinary, not routine or patently simple connections). Section 51.315(e) of the Code of Federal Regulations provides that that an incumbent that denies a competitor's request for UNE combinations has the obligation of demonstrating to the State Commission that the requested combination is not technically feasible.³⁷ As the Commission stated in addressing a similar issue in the *Arbitration Order*, requiring competitors to use a BFR process impermissibly shifts the burden of demonstrating technical feasibility from Verizon and onto the Competitor.³⁸ Similarly, the Commission here should make clear that Verizon may not use a BFR process for ordering ordinary or simple combinations in Virginia consistent with the market opening requirements of the Act, including Section 271.

Further, the Commission must implement requirements with specificity, such as through language to be made available in Verizon's interconnection agreements for Virginia to ensure that competitors in Virginia are no longer saddled with the unavailability of efficient, cost-based

UNE combinations because of uncertainty, inefficiency, or arguments designed simply to facilitate Verizon foot-dragging. The Commission should require UNE combination obligations that enable facilities-based, broadband providers like OpenBand to affordably and efficiently deploy competitive and innovative broadband, bundled, and converged services to residential consumers.

IV. ORDER PROCESSING AND DISPUTE RESOLUTION

One final area of significant concern to OpenBand is Verizon's methods for order processing and order dispute resolution. OpenBand's business model is designed to avoid relying upon the Verizon's facilities to the greatest extent possible. However, as discussed above, because of the ubiquitous nature of the Verizon's network, OpenBand must rely upon Verizon for certain critical facilities. Even where OpenBand does order Verizon facilities, it does not order them in large quantities, and often the facilities requested, while by no means unique or unprecedented, are not typical, especially in the suburban and rural areas where OpenBand is active.

OpenBand has encountered significant difficulties with the orders it places with Verizon. Taken in their best light, Verizon's actions in handling OpenBand's orders appear to be those of a large and inflexible organization that simply cannot respond reasonably to situations for which it has not developed a scripted response in advance. For example, OpenBand has encountered numerous situations where once an order is placed there is no clarity as to whether the order is processed under a retail tariff, a wholesale tariff, or under an interconnection agreement. Furthermore, OpenBand has also run into situations where orders were placed, processed and filled, only to have Verizon claim months later that the services were not available as a retail

³⁷ 47 C.F.R § 51.315(e).

offering, then not available as a wholesale offering, and finally simply not available at all, even though the circuits had already been supplied and paid for. Simultaneously, when OpenBand has sought guidance in how to use Verizon's ordering systems properly to the extent it was not already doing so, Verizon's account management team variously told OpenBand to process the order several different and contradictory ways. The turmoil that this uncertainty in the order processing created for OpenBand cannot be understated.

OpenBand believes the Commission must require that Verizon insert some common sense procedures to its order management process. Verizon should be required to review its orders within a reasonable time, concordant with the level of detail required for the order, to ensure that there are no material defects with the information supplied. Further, where there are non-material errors in order information, Verizon should continue processing the orders or at least keep the order's place in the queue while the information is corrected as necessary. Too often Verizon waits several weeks before rejecting an order, often for simple clerical mistakes. OpenBand has even had the experience where orders are rejected when the information was correct, but Verizon's systems simply could not process it because the order was for services that Verizon was unaccustomed to processing outside a BFR process, and that fact itself did not become apparent for weeks and months.

While the ordering process itself is the cause for great concern for OpenBand, it recognizes that good-faith disputes are bound to arise between incumbent local exchange carriers like Verizon and their wholesale customers / competitors - - like OpenBand. What is not acceptable is that such good-faith disputes should be dealt with through an interminable ad hoc process that seems to require legal intervention before Verizon's decision makers, usually in

³⁸ *VA Arbitration Order* at ¶ 353.

Texas, take the simple steps necessary to find out the facts on the ground in a particular circumstance.

Accordingly, in addition to quick review of its incoming orders, Verizon should also be required to implement a rapid response dispute resolution process that involves clear escalation procedures. Further, the Commission should mandate short time frames within which ordering disputes must be processed. It has been OpenBand's experience that the current ad hoc approach takes weeks and months, in which time small clerical errors magnify into critical operational issues. In addition the Commission itself should make available a rapid response dispute resolution system for the quick resolution of minor ordering and similar disputes. The Rapid Response system implemented by the Maine Commission can serve as a model for this type of system.³⁹

³⁹ See *Maine Letter* at Attachment A.